UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2341/42/43/44/45/46/47/48/49/50

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

THE STATE OF ALASKA, on its own behalf and on behalf of its cities, boroughs, and other political subdivisions

v.

BOISE CASCADE CORPORATION, a Delaware Corporation; CHAMPION INTERNATIONAL CORPORATION, A New York Corporation; CROWN ZELLERBACH CORPORATION, a Nevada Corporation; GREAT NORTHERN NEKOOSA CORPORATION, A Maine Corporation; HAMMERMILL PAPER COMPANY, a Pennsylvania Corporation; INTERNATIONAL PAPER COMPANY, a New York Corporation; KIMBERLY CLARK CORPORATION, a Delaware Corporation; THE MEAD CORPORATION, an Ohio Corporation; POTLATCH CORPORATION, a Delaware Corporation; SCOTT PAPER COMPANY, a Pennsylvania Corporation; ST. REGIS PAPER COMPANY, a New York Corporation; UNION CAMP CORPORATION, a Virginia Corporation; WAUSAU PAPER MILLS CO., a Wisconsin Corporation; WESTVACO CORPORATION, a Delaware Corporation; WEYERHAEUSER COMPANY, a Washington Corporation; BLAKE, MOFFIT & TOWNE, INC., a division of SAXON INDUSTRIES, INC., a New York Corporation; WESTERN PAPER COMPANY, a Division of Hammermill Paper Company, a Pennsylvania Cor-

poration; and ZELLERBACH PAPER COMPANY, a Division of Crown Zellerbach Corporation, a Nevada Corporation,

State of Alaska,
Appellant in No. 81-2341

(D.C. Civil No. 78-2958)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF COLORADO

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, d/b/a/ Zellerbach Paper Company, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY and DIXON PAPER COMPANY,

State of Colorado,
Appellant in No. 81-2342

(D.C. Civil No. 78-1359)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF WASHINGTON, on behalf of itself and its public entities

v.

BOISE CASCADE CORP., CHAMPION INTERNATIONAL CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, POTLATCH, INC., SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, INC., a Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, INC. a Division of UNISOURCE CORP., ZELLERBACH PAPER COMPANY, a Division of CROWN ZELLERBACH CORPORATION,

State of Washington,
Appellant in No. 81-2343

(D.C. Civil No. 78-3081)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF MISSOURI

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY CORPORATION,

BUTLER PAPER COMPANY, GRAHAM PAPER COMPANY, BERMINGHAM & PROSSER COMPANY, DISTRIBIX, INC. PAPER SUPPLY COMPANY, AND SHAUGHNESSY-KNIE-PHAWE PAPER COMPANY,

State of Missouri,
Appellant in No. 81-2344

(D.C. Civil No. 78-1095)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

THE STATE OF OREGON, on its own behalf and on behalf of its cities, counties, and other political subdivisions,

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, Division of UNISOURCE CORPORATION, WESTERN PAPER COMPANY, Division of HAMMERMILL PAPER COMPANY, and ZELLERBACH PAPER COMPANY, Division of CROWN ZELLERBACH CORPORATION,

State of Oregon,
Appellant in No. 81-2345

(D.C. Civil No. 78-1050)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D. C. MDL No. 323)

THE STATE OF CALIFORNIA, on behalf of itself and all political subdivisions, public agencies and districts within the State similarly situated

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY, an affiliate of GREAT NORTHERN NEKOOSA CORP., J. C. PAPER COMPANY, an affiliate of WAUSAU PAPER MILLS CO., NATIONWIDE PAPERS, INCORPORATED, a division of CHAMPION INTERNATIONAL CORP., SEABOARD PAPER COMPANY, an affiliate of MEAD CORP., ZELLERBACH PAPER COMPANY, a division of CROWN ZELLERBACH CORP., BLAKE, MOFFITT & TOWNE, a division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, a division of UNISOURCE CORP., INGRAM PAPER COMPANY and NOLAND PAPER COMPANY (Carpenter/Offutt Paper Co.),

State of California,
Appellant in No. 81-2346

(D.C. Civil No. 78-2494)

(D.C. Civil No. 78-2494)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

NEBRASKA, STATE OF

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS CO., WESTVACO CORPORATION, WEYERHAUSER COMPANY, CROWN ZELLERBACH CORPORATION, KIMBLERLY CLARK and WESTERN PAPER CO., a Division of Hammermill Paper Company,

State of Nebraska,
Appellant in No. 81-2347

(D.C. Civil No. 78-1049)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

STATE OF IOWA, by its Attorney General, Richard C. Turner

v.

BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORPORATION; THE MEAD CORPORATION; GREAT NORTHERN NEKOOSA CORPORATION; HAMMERMILL PAPER COMPANY; INTERNATIONAL PAPER COMPANY; POT-

LATCH CORPORATION; SCOTT PAPER COMPANY; ST. REGIS PAPER COMPANY; UNION CAMP CORPORATION; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; and WEYERHAEUSER COMPANY,

State of Iowa,
Appellant in No. 81-2348

(D.C. Civil No. 78-1096)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D.C. MDL No. 323)

MONTANTA, STATE OF

v.

BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORP.; GREAT NORTHERN NEKOOSA CORP.; HAMMERMILL PAPER CO.; INTERNATIONAL PAPER CO.; MEAD CORP.; THE POTLATCH CORP.; SCOTT PAPER CO.; ST. REGIS PAPER CO.; UNION CAMP CORP.; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; WEYERHAEUSER CO.; CROWN ZELLERBACH CORP.; and KIMBERLY CLARK,

State of Montana,
Appellant in No. 81-2349

(D.C. Civil No. 78-3576)

IN RE: FINE PAPER ANTITRUST LITIGATION

(D. C. MDL No. 323)

STATE OF ARKANSAS

v.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTH-

ERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WESTERN PAPER COMPANY, GRAHAM PAPER COMPANY,

State of Arkansas,
Appellant in No. 81-2350

(D.C. Civil No. 78-1716)

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 15, 1982

Before: ALDISERT, GIBBONS, and
HIGGINBOTHAM, *Circuit Judges*

(Filed July 16, 1982)

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OPINION OF THE COURT

ALDISERT, *Circuit Judge*.

These consolidated appeals present several procedural issues arising from a complex antitrust proceeding. Ten states, plaintiffs below, appeal from judgments entered on a jury verdict in their actions for treble damages alleging a nationwide price-fixing conspiracy in vio-

lation of §1 of the Sherman Act. The defendants did not offer any evidence at trial, but rested at the close of the plaintiffs' case; the jury then found in favor of all defendants. On appeal, the plaintiffs assert numerous procedural errors, generally contending that the district court unduly limited their opportunity to develop and present their case. We are not persuaded that the district court either abused its discretion or erred in its selection, interpretation, or application of the controlling legal precepts, and therefore we will affirm its judgment in all respects.

I.

This case has a complicated procedural history, owing in part to the number of parties. Named as defendants were manufacturers and merchants of "fine paper,"[1] which the states buy in large quantity. Some of the merchants are owned by the mills themselves and some are independent. Beginning in 1977, following the initiation of ultimately inconclusive investigations by the Federal Trade Commission and the United States Department of Justice, several states and private plaintiffs brought a total of 37 individual actions alleging that the mills and merchants had participated in a nationwide price-fixing conspiracy. Pursuant to 28 U.S.C. §1407, the Judicial Panel on Multi-District Litigation transferred the cases to the Eastern District of Pennsylvania for coordinated pre-trial proceedings, assigned to Judge

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1. The district court defined "fine paper" to include

> all printing and writing papers and all paper products into which such papers are converted, including coated and uncoated book, publication (excluding newsprint), printing and converting papers, offset papers, chemical writing papers (bond and writing, form bond, ledger, mimeograph, duplication and related papers), cotton content papers, cover and text papers, thin papers (excluding cigarette, condenser and filter papers), and bristols.

In re Fine Paper Antitrust Litigation, 82 F.R.D. 143, 147 (E.D.Pa. 1979).

Joseph L. McGlynn.[2] *In re Fine Paper Antitrust Litigation*, 446 F.Supp. 759 (J.P.M.D.L. 1978) (per curiam); 453 F.Supp. 118 (J.P.M.D.L. 1978) (per curiam).

The district court divided the plaintiffs into three groups: a class of private plaintiffs, "minority states," and "majority states." The minority states alleged only a horizontal conspiracy among the mill defendants; the majority states, the present appellants, alleged both a horizontal conspiracy among the mill defendants and vertical conspiracies involving mills and merchants. In addition to certifying a class of private plaintiffs, the court certified each minority state and its respective government entities as a separate plaintiff class,[3] but it refused to do the same for the majority states because the added factor of vertical conspiracy made those actions less susceptible to generalized proof. *In re Fine Paper Antitrust Litigation*, 82 F.R.D. 143 (E.D.Pa. 1979). *See* Fed. R. Civ. P. 23(b)(3).

Following a pre-trial conference on March 7, 1979, the court established discovery deadlines and set a tentative trial date of January 2, 1980. The next few months were occupied with discovery and related motions. On September 27, 1979, plaintiffs asked for an extension of the trial date because of the number of depositions they wished to take, but the court expressed reluctance to deviate from its schedule. At a conference on December 4, 1979, the court rejected plaintiffs' proposal that trial not begin until October 1980, but it rescheduled the trial for the "certified plaintiffs" (the private plaintiffs and the minority states) to September 22, 1980, barring a "nu-

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2. This court previously has considered other issues arising from these proceedings. *See In re Fine Paper Litigation State of Washington*, 632 F.2d 1081 (3d Cir. 1980) (dismissal of settling defendants; assignment of claims); *In re Fine Paper Antitrust Litigation*, 617 F.2d 22 (3d Cir. 1980) (disqualification of class attorneys).

3. Each of these classes comprised the state and its cities, counties, other political subdivisions, school districts, government universities, and community colleges that had purchased fine paper from defendants.

clear holocaust." The court did not fix a trial date for the majority states, but it established July 3, 1980, as the discovery cut-off date in all of the cases.

On January 15, 1980, the court decided it could resolve the litigation more efficiently if trial on the majority states' claims were conducted in advance of the certified plaintiffs' trial. It then set for the majority states a trial date of June 16, 1980, and a revised discovery deadline of May 30. Appellants vehemently protested that they still had 300,000 documents to review and more than 100 depositions to take, and that the court's revised schedule left inadequate time for discovery and trial preparation. The court denied their motion for reconsideration.

On January 17, 1980, the court entered an order that all parties would be deemed to have consented to venue and to have waived objections to trial in the Eastern District of Pennsylvania unless they filed written objections. The majority states opposed the proposed transfer.

In early June 1980, in contemplation of a June 16 trial, the majority states submitted a 200-page pre-trial memorandum. Defendants moved to dismiss, contending that the memorandum was unacceptable because it presented only conclusory allegations rather than the specific enumeration of facts the court had required. The court did not grant defendants' motion, but it ordered plaintiffs to prepare a memorandum by July 25 "which outlines the case chapter and verse as to each defendant." App. at 2064-65. Plaintiffs moved for a continuance, again complaining that they had not been allowed enough time for discovery. The court stated that the majority states' actions would be tried with or after the certified plaintiffs' trial. It did not modify the discovery schedule, but it did allow some additional depositions.

The certified plaintiffs settled their cases shortly before trial. On September 25, 1980, the court announced

that the majority states' trial would begin on October 6, 1980 — nine months after the tentative trial date and four months after the trial date set on January 15, 1980. Although they had been on notice since January 17, 1980, that the court wished to try the cases itself, the plaintiffs objected that they would have insufficient time to set up a Philadelphia office and to transport their files across the country. The court considered these arguments but concluded that October 6 was a realistic date.

On September 29, 1980, over plaintiffs' objections, the district court, pursuant to 28 U.S.C. §1404(a), formally transferred all of the majority states' cases to the Eastern District of Pennsylvania for trial, which began on October 6, 1980. Following plaintiffs' four-week presentation, which consisted primarily of reading depositions to the jury, the defendants rested without offering any evidence. The jury returned a verdict in favor of all defendants on December 2, 1980.

II.

Appellants present several challenges to the district court's conduct of the trial and the pre-trial proceedings. They argue that the trial court abused its discretion in scheduling the discovery cut-off and trial dates; that it improperly transferred the actions to itself for trial under 28 U.S.C. §1404(a); that it erred by refusing to admit conditionally the out-of-court statements of alleged co-conspirators; that it erred in entering a partial directed verdict for defendants on claims arising from purchases from independent merchants; that it erred in denying class certification to each of the majority states; that in imposing a discovery sanction it erred in excluding evidence submitted by the state of Arkansas; and that it erred both in ruling that fine paper purchases of state colleges and universities were not state purchases and thereafter in denying plaintiffs' motion to amend their complaints to add those institutions as parties. We consider these contentions seriatim.

III.

Appellants' primary argument is that they were afforded too little time for discovery and trial preparation. Appellants have a heavy burden to bear, however, as matters of docket control and conduct of discovery are committed to the sound discretion of the district court. *Business Ass'n of University City v. Landrieu*, 660 F.2d 867, 877 (3d Cir. 1981); *Borden Co. v. Sylk*, 410 F.2d 843, 845 (3d Cir. 1969). We will not interfere with a trial court's control of its docket "except upon the clearest showing that the procedures have resulted in actual and substantial prejudice to the complaining litigant." *Eli Lilly & Co. v. Generix Drug Sales, Inc.*, 460 F.2d 1096, 1105 (5th Cir. 1972). Similarly, we will not upset a district court's conduct of discovery procedures absent "a demonstration that the *court's* action made it impossible to obtain crucial evidence, and implicit in such a showing is proof that more diligent discovery was impossible." *Id.*

We find no abuse of discretion by the district judge in his scheduling of discovery or of the trial. After considering all of appellants' contentions and examining the 16-volume appendix that they have supplied to this court, we are not persuaded that the pre-trial rulings of the district court prejudiced the preparation or presentation of their case. The trial of their antitrust claims followed fifteen months of discovery, including approximately 270 depositions and production of nearly two million documents. The trial commenced four months after conclusion of discovery and one month after the date appellants had earlier set as the date on which they would be ready for trial.[4]

When discovery ended on May 30, 1980, the majority states sought a continuance and further discovery.

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4. On June 16, 1980, counsel for appellants explained to the court: "I think we may need to September 1 to *accomplish everything* . . . ." App. at 2068 (emphasis added).

The court allowed them to depose some additional witnesses and, relying on their representation that they would need until September 1 to prepare for trial, advised them that their trial would commence with or after the certified plaintiffs' trial, scheduled for September 22, 1980.

Upon settlement of the certified plaintiffs' cases, the court on September 25, 1980, notified appellants that their trial would commence on October 6. Appellants again requested a continuance, but the district court responded:

> Every time I set a deadline I get the same problem arising from the Majority States. They're never ready. They can't go to trial, the case is going to be prejudiced. The same thing happened in June, the same thing when I asked you to file answers to these interrogatories and you didn't have the time. The same thing happened when I asked you to file your pretrial memorandum. You said you didn't have the time, you needed more time, you wanted to supplement. I gave you time to supplement. It hasn't even been supplemented yet, except for a couple of states. It's just constant.

App. at 3970-71. Having reviewed the record, we consider the district court's observations to be accurate. Moreover, we do not share the view expressed by appellants' counsel at oral argument that antitrust cases involving price fixing are generically complex. It has been our experience that the legendary complexity is due largely to the parties' inability or unwillingness to simplify their presentations. Our independent review of the record persuades us that the trial court in this case was firm but fair. It deferred the trial date from January 2 to June 16 to October 6, 1980, and it accommodated appellants' requests whenever feasible. The appellants have not shown that "the court's action made it impossible to obtain crucial evidence"; nor have they made a clear show-

ing that the court's conduct "resulted in actual and substantial prejudice." We find no abuse of discretion.

IV.

Appellants also argue that the district court improperly transferred the cases to the Eastern District of Pennsylvania under 28 U.S.C. §1404(a) and that it should have sent the cases back to the states' home districts, or alternatively to the Northern District of California, the plaintiffs' preferred forum, for trial.[5] Section 1404(a) states: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." The gravamen of appellants' contention is that at the time the states' complaints were filed, venue in the Eastern District would have been improper with respect to some of the defendants. At the time of the transfer, however, those particular defendants had settled and were no longer in the case.

Relying on *Hoffman v. Blaski*, 363 U.S. 335 (1960), appellants read §1404(a)'s phrase, "where it might have been brought," to preclude a transfer notwithstanding the prior settlement of all parties as to whom venue in the transferee district would have been improper. Assuming that plaintiffs have sustained the prejudice necessary to assert this venue argument, we do not read *Hoffman* and §1404(a) to be so grudging. In *Hoffman*

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5. Rule 11(b) of the Judicial Panel on Multidistrict Litigation's Rules of Procedure provides that:

> Each transferred action that has not been terminated in the transferee court shall be remanded by the Panel to the transferor district for trial, unless ordered transferred by the transferee judge to the transferee or other district under 28 U.S.C. §1404(a) or 28 U.S.C. §1406. In the event that the transferee judge transfers an action under 28 U.S.C. §§1404(a) or 1406, no further action of the Panel shall be necessary to authorize further proceedings including trial.

the defendants themselves requested the transfer, consenting to proceed in a district in which they could have objected to venue at the outset. The Supreme Court held that the power to transfer under §1404(a) does not depend "upon the wish or waiver of the defendant." 363 U.S. at 343. *Hoffman* thus precludes transfer over a plaintiff's objections to a district in which venue would be improper as to a defendant who remained a party to the action. In this case, by contrast, the defendants as to whom venue in the Eastern District would have been improper were no longer parties at the time of transfer.

We agree with the district court that it was not required to confine its venue consideration to the facts as they existed at the time of the complaint. Just as venue defects as to a party whose portion of the action has been severed do not bar transfer of the remainder of the action, *Wyndham Associates v. Bintliff*, 398 F.2d 614, 618-19 (2d Cir.), *cert. denied*, 393 U.S. 977 (1968), a party's settlement of his portion of the action cures any objection to venue in the transferee district with respect to that party. *Hess Oil Virgin Islands Corp. v. UOP, Inc.*, 447 F.Supp. 381 (N.D. Okla. 1978). *See also* 15 C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure §3845 (1976). At the time of the transfer to the Eastern District, the action "might have been brought" in the Eastern District as to all of the parties remaining in the case. Appellants would have us hold that even if the trial below were otherwise error free, a new trial would be warranted because some of their earlier adversaries — who were no longer parties to the suit at the time trial began — could have objected to venue in the Eastern District had transfer been attempted prior to their settlements. Their reading of §1404(a) and *Hoffman* reflects adherence to the tradition of mechanical jurisprudence — following "a maxim or a definition with relentless disregard of consequences to 'a dryly logical extreme,' " *Hynes v. New York Cent. R. Co.*, 231 N.Y. 229, 235, 131 N.E. 898, 900 (1921) (Cardozo, J.).

We are disinclined to accept appellants' interpretation, and we hold that the district court did not err.[6]

Nor do we conclude that in transferring the actions to itself for trial the district court abused its discretion. Although the district court did not expressly quantify the interest in plaintiffs' convenience, it concluded that plaintiffs' convenience was outweighed by the comparative economy of trying one action in the Eastern District rather than several actions in the states' home districts. Given the complexity of the proceedings, we consider this conclusion to be reasonable. Moreover, we also believe that in an appropriate case the court may properly consider whether judicial efficiency would be served by enabling the judge who has presided over the pre-trial phase of a multi-district proceeding, and thereby has become familiar with the parties and the issues, to try the actions himself rather than to return them to one or more district judges who must acquaint themselves with the cases' complexities.[7] We conclude that the district

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6. Appellants argue alternatively that at the filing of the complaint, venue would have been improper in the Eastern District as to defendant Butler Paper, a company that did not settle and is one of the present appellees. The district court addressed this contention, however, and specifically found that the case against Butler could have been brought in the Eastern District of Pennsylvania. The court did not state with particularity the reasons underlying its conclusion, but there was evidence in the form of an affidavit from an official of defendant Weyerhaeuser Co. that Butler purchased a large amount of paper from a Weyerhaeuser mill in Eastern Pennsylvania, constituting transaction of business sufficient to establish venue in the Eastern District of Pennsylvania under 15 U.S.C. §22. We conclude, therefore, that the district court did not err in determining that the transfer was proper as to Butler.

7. The second circuit considered a similar problem of multi-district litigation in *Pfizer, Inc. v. Lord*, 447 F.2d 122 (2d Cir. 1971) (per curiam). A district judge who had conducted the pre-trial proceedings while sitting by designation in the Southern District of New York, decided to transfer the actions to his own District of Minnesota for trial. Defendants opposing the transfer peti-

court neither erred in its interpretation of the law applicable to transfers under §1404(a) nor abused its discretion in transferring to itself for trial the proceeding over which it had presided in the pre-trial stage.

V.

Appellants argue next that the district court abused its discretion in not admitting evidence of certain declarations of co-conspirators made during the course and in furtherance of the conspiracy. Appellants appear to present a two-tiered argument relying on Fed. R. Evid. 801(d)(2)(E), *United States v. Continental Group*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980), and *United States v. Trowery*, 542 F.2d 623 (3d Cir. 1976) (per curiam), *cert. denied*, 429 U.S. 1104 (1977). Although the elements of their argument are blurred, they appear to contend that the district court was obligated to determine the competency of the proffered evidence by considering whether plaintiffs had made a sufficient showing that a joint undertaking existed at the time of the statements; and alternatively that

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tioned for a writ of mandamus. The court of appeals denied the petition and noted that the judge

> indicated that he felt that because of the complexity of these cases the interests of judicial efficiency made it highly desirable that the judge who conducted the pretrial proceedings continue as the trial judge, and that it would be impossible for him to remain in the Southern District of New York for the length of time that these trials were expected to take. While the convenience of the judge is, of course, not normally a factor to be weighed in considering a section 1404(a) motion, in the unusual circumstances of this case we do not feel that it was an abuse of discretion to give some consideration to this problem in balancing the various interests. In any litigation of this type it would, of course, be impossible to find any forum that was totally convenient to all those involved. Judge Lord's solution appears fully justified under the circumstances.

Id. at 125.

even absent such a determination, the court nevertheless was required to admit the evidence conditionally.

Evidence of extra-judicial statements made by alleged co-conspirators may be admitted upon the court's finding that there is a sufficient showing of a common enterprise by means of evidence independent of the proffered declaration. *Trowery*, 542 F.2d at 626-27. Alternatively, the court may admit the hearsay evidence subject to later connection. *Continental Group*, 603 F.2d at 457. We believe that in this case the district court's refusal to admit the extra-judicial statements included an implicit determination that plaintiffs had not met their burden under *Trowery*. *Cf. Continental Group*, 603 F.2d at 457 (finding that government had met its burden under *Trowery* was implicit in court's denial of defendants' motion to strike). Significantly, appellants do not direct our attention to any independent evidence on which the court might have based a determination of competency.[8] Thus, appellants must rely on their argument that the district court was required to admit the evidence conditionally. In this regard we believe appellants misread *Continental Group*. In that decision we held that a trial court in its discretion may — not must — admit alleged co-conspirators' declarations under Rule 801(d)(2)(E) subject to later connection. We expressed our concern for the possible prejudice to conspiracy defendants that could result from conditional admission where the competency of the evidence is not thereafter demonstrated, and we stated that conditional admission should be used sparingly. As Chief Judge Seitz wrote for the court

> This court has recognized that there is a real danger in a conspiracy trial involving numerous de-

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8. For this reason we need not reach appellants' contention that in a civil conspiracy case the plaintiff need make out only a prima facie case of conspiracy as a prerequisite to admission.

> fendants that the jury may find a particular defendant guilty merely because of his association with the other defendants. *See United States v. American Radiator & Standard Sanitary Corp.*, [433 F.2d 174, 195 (3d Cir. 1970)]. One aspect of this danger is that the trial judge, after admitting hearsay declarations of alleged co-conspirators subject to later connection, may find at the close of all the evidence that the government has not borne its burden of proving by independent evidence that those declarations were made during the course and in furtherance of a conspiracy joined in by both the defendant and the declarant. Cautionary instructions to the jury might not suffice to cure the resulting prejudice to the defendant.

603 F.2d at 456. We find no abuse of discretion in the trial court's exclusion of the out-of-court declarations of alleged co-conspirators in this case.

VI.

Prior to submitting the case to the jury, the trial court granted in part defendants' motion for directed verdict. Finding no proof of a single nationwide conspiracy involving both the mills and the independent merchants, the court barred claims against the mills based on plaintiffs' purchases from independent merchants[9] and permitted only proof relating to the mill and mill-owned merchant defendants.[10] Appellants' primary

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9. Plaintiffs settled their claims against all independent merchant defendants before trial.

10. The district court stated:

> [T]his record has not established proof of a single unitary nationwide conspiracy, including both the mills and the independent merchants. So to the extent that any of your claims are based upon sales or purchases from independent merchants, including those named as defendants in this case, your claims will not be allowed. Whatever proof will be permitted will be

concern seems not to be the exclusion of their claims based on purchases from the independent merchants, however, but that certain evidence which they argue was probative of their conspiracy claims against the mills and the mill-owned merchants was thereby "excised." Thus, appellants' challenge of the directed verdict has two dimensions: that the directed verdict itself was improperly granted, and that their case against the mills and mill-owned merchants was unfairly prejudiced by their inability to use evidence relating to the independent merchants.

They argue first that, notwithstanding the district court's finding, there was a sufficient quantum of evidence relevant to the involvement of the independent merchants to enable a jury to grant relief. They fault the district court for examining each piece of evidence in isolation rather than viewing the evidence in its totality. This, they charge, was "compartmentalizing the proof," in violation of the teachings of *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 698-99 (1962). In *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d 105, 115 (3d Cir. 1980), *cert. denied*, 451 U.S. 911 (1981), we stated the scope of appellate review applicable to directed verdicts:

> The appellate court must consider the record as a whole and in the light most favorable to the non-moving party, drawing all reasonable inferences to support its contentions. If no reasonable resolution of the conflicting evidence and inferences therefrom could result in a judgment for the non-moving party, the appellate court must affirm the lower court's decision.

NOTE — *(Continued)*

> proof [relating to the] mill-owned merchants from whom the individual states bought paper manufactured by the ten mill defendants in this case.

App. at 4499.

Applying this stringent standard of review, we have examined the record and are persuaded that the district court did not err. Plaintiffs alleged a nationwide conspiracy between mills and independent merchants. Viewed in the light most favorable to appellants, the evidence upon which they rely in their challenge to the directed verdict involves only communication among merchants relating to retail prices. Like the district court, we will not permit a jury to infer from communication at a lower level the existence of a conspiracy at a higher level as alleged in the complaints. Submission of this evidence to the jury would have required the jurors to resort to guesswork and conjecture, allowing "mere speculation . . . to do duty for probative facts." *Edward J. Sweeney & Sons v. Texaco, Inc.*, 637 F.2d at 115 (quoting *Galloway v. United States*, 319 U.S. 372, 395 (1943)). *Continental Ore* does not assist appellants. The "compartmentalizing" condemned by the Supreme Court consisted of a seriatim examination of the claims against each of five conspiracy defendants as if they were separate lawsuits, thereby overlooking the conspiracy claim itself. *See* 370 U.S. at 698-99. In the instant case the court refused to submit to the jury evidence which at best was probative of an alleged conspiracy unrelated to the conspiracy whose existence was in issue. We conclude that the district court did not err.

Nor can we conclude that appellants were prejudiced by the exclusion of evidence relating to the independent merchants. Notably, appellants do not contest appellees' observations that all of the excluded evidence deals with retail prices and that appellants purchased paper not at retail but only on the basis of bids. We do not perceive any prejudice resulting from the entry of the directed verdict.

VII.

Because of the view we take regarding the contentions discussed above, appellants' remaining arguments require only brief consideration. Again we find no error or abuse of discretion.

Noting that the district court certified classes of government entities for each of the minority states, appellants argue that the district court erred in denying similar certification to the majority states. They contend that the only difference between the two groups of plaintiff states was the majority states' allegations of vertical conspiracies among mills and independent merchants, and they argue that this distinction was an insufficient basis for denial of certification. We have said that a decision on class status is normally within the discretion of the trial court, *Gardner v. Westinghouse Broadcasting Co.*, 559 F.2d 209, 212 (3d Cir. 1977), *aff'd*, 437 U.S. 478 (1978), and we now conclude that the district court in this case acted wholly within the bounds of its discretion. One prerequisite to class certification under Fed. R. Civ. P. 23(b)(3) is a determination that common questions of fact or law predominate over questions affecting only individual members. The common issue here, whether there was a horizontal conspiracy among the mill defendants, easily could be overwhelmed by the separate proof required to establish that each individual independent merchant had participated with the mills in an individual vertical conspiracy. Proof as to vertical conspiracy would vary among the class members, depending on the identity of the merchants from whom the respective government entities purchased their paper. Given that appellants sought to include in their classes not only entities which purchased from the named defendants but also those who purchased from an unspecified number of alleged co-conspirators, the likely factual variations among the alleged vertical conspiracies seems to us a reasonable basis for denying certification under Rule 23(b)(3).

Appellants also charge that the district court abused its discretion when, as a sanction for failure to comply with a discovery order, it precluded plaintiff Arkansas from introducing evidence of its purchases of fine paper. Some of the defendants had served interrogatories and requests for production of documents on the states, seeking information about the states' purchases of fine paper. The states did not produce the requested information, but, relying on Fed. R. Civ. P. 33(c),[11] responded that the documents containing the relevant information already had been produced and that the defendants could find the information in those documents as easily as plaintiffs could. The court granted defendants' motion under Fed. R. Civ. P. 37(a) to compel answers. Plaintiffs continued to oppose discovery, and the court granted defendants' motion for sanctions but deferred imposition. Subsequently reminded at trial that Arkansas had not completed the interrogatories, the court prohibited Arkansas from introducing evidence relating to its purchases.

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11. Rule 33(c) provides:

Option to Produce Business Records.

Where the answer to an interrogatory may be derived or ascertained from the business records of the party upon whom the interrogatory has been served or from an examination, audit or inspection of such business records, including a compilation, abstract or summary thereof, and the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served, it is a sufficient answer to such interrogatory to specify the records from which the answer may be derived or ascertained and to afford to the party serving the interrogatory reasonable opportunity to examine, audit or inspect such records and to make copies, compilations, abstracts or summaries. A specification shall be in sufficient detail to permit the interrogating party to locate and to identify, as readily as can the party served, the records from which the answer may be ascertained.

(as amended 1980).

We have indicated our deference to the trial court's determination of the relative burdens of sifting through documents under Rule 33(c), *Al Barnett & Son v. Outboard Marine Corp.*, 611 F.2d 32 (3d Cir. 1979), and we note that the rule appears to have been drafted in contemplation of the tactic attempted by plaintiffs. By its own terms the rule is unavailable unless "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party served." Fed. R. Civ. P. 33(c) (as amended 1980). The Advisory Committee on the Rules has noted, "The Committee is advised that parties upon whom interrogatories are served occasionally responded by directing the interrogating party to a mass of business records . . . justifying the response by the option provided by this subdivison. Such practices are an abuse of the option." *Id.* (Notes of Advisory Committee). Appellants have not persuaded us that the district court abused its discretion in applying these precepts. Similarly, we conclude that the district court acted within its discretion in selecting and imposing a sanction. In a proper case the court may dismiss entirely the claim of a party who will not cooperate in discovery. *National Hockey League v. Metropolitan Hockey Club*, 427 U.S. 639 (1976). Given the nature of Arkansas' violation, the sanction imposed was appropriate: the evidence excluded bears a direct relation to the evidence sought under the discovery order. *Cf. Compagnie des Bauxites de Guinea v. Insurance Co. of North America*, 651 F.2d 877, 885 (3d Cir. 1981), *aff'd sub nom. Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinea*, ____ U.S. ____ (50 U.S.L.W. 4553, June 1, 1982) (defendants' failure to respond to requests for information relevant to personal jurisdiction over defendants warrants court's assumption of jurisdiction as a Rule 37(b)(2)(A) sanction). We find no abuse of discretion in the district court's handling of this matter.

Appellants' final argument relates to purchase of fine paper by the state colleges and universities of seven

of the plaintiff states. Late in the evidentiary phase of plaintiffs' trial presentation, the district court ruled that evidence of fine paper purchases by the colleges and universities would not be admitted because there had been no showing that the institutions were state agencies whose claims could be asserted by the state. The states subsequently sought to amend their complaints to add the institutions as parties plaintiff, but the court denied their motions.

Based on our examination of the record, we find no abuse of discretion. The states had provided no evidence from which the court could conclude that the educational institutions' purchases were effectively purchases by the states. Moreover, in view of our disposition of this appeal, even if we were to accept appellants' argument that the institutions are state agencies under relevant state law, failure to allow the damages claims was at worst harmless. As to the court's denial of the states' motion to amend, the complexity of the litigation and the late point in the proceedings at which the motion was presented lead us to find no abuse of discretion in refusing to add more parties to an already complicated proceeding.

VIII.

We have considered all of the contentions presented by the appellants and conclude that there was no abuse of discretion or reversible error.

The judgment of the district court will be affirmed.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Nos. 81-2341/42/43/44/45/46/47/48/49/50

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

THE STATE OF ALASKA, on its own behalf and on behalf of its cities, boroughs, and other political subdivisions

vs.

BOISE CASCADE CORPORATION, a Delaware Corporation; CHAMPION INTERNATIONAL CORPORATION, A New York Corporation; CROWN ZELLERBACH CORPORATION, a Nevada Corporation; GREAT NORTHERN NEKOOSA CORPORATION, A Maine Corporation; HAMMERMILL PAPER COMPANY, a Pennsylvania Corporation; INTERNATIONAL PAPER COMPANY, a New York Corporation; KIMBERLY CLARK CORPORATION, a Delaware Corporation; THE MEAD CORPORATION, an Ohio Corporation; POTLATCH CORPORATION, a Delaware Corporation; SCOTT PAPER COMPANY, a Pennsylvania Corporation; ST. REGIS PAPER COMPANY, a New York Corporation; UNION CAMP CORPORATION, a Virginia Corporation; WAUSAU PAPER MILLS CO., a Wisconsin Corporation; WESTVACO CORPORATION; a Delaware Corporation; WEYERHAEUSER COMPANY, a Washington Corporation; BLAKE, MOFFIT & TOWNE, INC., a division of SAXON INDUSTRIES, INC., a New York Corporation; WESTERN PAPER COMPANY, a Division of Hammermill Paper Company, a Pennsylvania Corporation; and ZELLERBACH PAPER COMPANY, a Division of Crown Zellerbach Corporation, a Nevada Corporation,

State of Alaska
Appellant in No. 81-2341
(D.C. Civil No. 78-2958)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF COLORADO

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, d/b/a/ Zellerbach Paper Company, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY, and DIXON PAPER COMPANY,

State of Colorado,
Appellant in No. 81-2342
(D.C. Civil No. 78-1359)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF WASHINGTON, on behalf of itself and its public entities

vs.

BOISE CASCADE CORP., CHAMPION INTERNATIONAL CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, POTLATCH, INC., SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, INC., a Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER

COMPANY, INC. a Division of UNISOURCE CORP., ZELLERBACH PAPER COMPANY, a Division of CROWN ZELLERBACH CORPORATION,

State of Washington,
Appellant in No. 81-2343
(D.C. Civil No. 78-3081)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF MISSOURI

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY CORPORATION, BUTLER PAPER COMPANY, GRAHAM PAPER COMPANY, BERMINGHAM & PROSSER COMPANY, DISTRIBIX, INC. PAPER SUPPLY COMPANY, AND SHAUGHNESSY-KNIEP-HAWE PAPER COMPANY,

State of Missouri,
Appellant in No. 81-2344
(D.C. Civil No. 78-1095)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

THE STATE OF OREGON, on its own behalf and on behalf of its cities, counties, and other political subdivisions,

vs.

BOISE CASCADE CORPORATION, CHAMPION

INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BLAKE, MOFFITT & TOWNE, Division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, Division of UNISOURCE CORPORATION, WESTERN PAPER COMPANY, Division of HAMMERMILL PAPER COMPANY, and ZELLERBACH PAPER COMPANY, Division of CROWN ZELLERBACH CORPORATION,

State of Oregon,
Appellant in No. 81-2345
(D.C. Civil No. 78-1050)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

THE STATE OF CALIFORNIA, on behalf of itelf and all political subdivisions, public agencies and districts within the State similarly situated

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WEYERHAEUSER COMPANY, BUTLER PAPER COMPANY, an affiliate of GREAT NORTHERN

NEKOOSA CORP., J. C. PAPER COMPANY, an affiliate of WAUSAU PAPER MILLS CO., NATIONWIDE PAPERS, INCORPORATED, a division of CHAMPION INTERNATIONAL CORP., SEABOARD PAPER COMPANY, an affiliate of MEAD CORP., ZELLERBACH PAPER COMPANY, a division of CROWN ZELLERBACH CORP., BLAKE, MOFFIT & TOWNE, a division of SAXON INDUSTRIES, INC., CARPENTER-OFFUTT PAPER COMPANY, a division of UNISOURCE CORP., INGRAM PAPER COMPANY and NOLAND PAPER COMPANY (Carpenter/Offutt Paper Co.),

State of California,
Appellant in No. 81-2346
(D.C. Civil No. 78-2494)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

NEBRASKA, STATE OF

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION, WAUSAU PAPER MILLS CO., WESTVACO CORPORATION, WEYERHAUSER COMPANY, CROWN ZELLERBACH CORPORATION, KIMBERLY CLARK and WESTERN PAPER CO., a Division of Hammermill Paper Company,

State of Nebraska,
Appellant in No. 81-2347
(D.C. Civil No. 78-1049)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF IOWA, by its Attorney General,
Richard C. Turner
vs.
BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORPORATION; THE MEAD CORPORATION; GREAT NORTHERN NEKOOSA CORPORATION; HAMMERMILL PAPER COMPANY; INTERNATIONAL PAPER COMPANY; POTLATCH CORPORATION; SCOTT PAPER COMPANY; ST. REGIS PAPER COMPANY; UNION CAMP CORPORATION; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; and WEYERHAEUSER COMPANY,

State of Iowa,
Appellant in No. 81-2348
(D.C. Civil No. 78-1096)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

MONTANA, STATE OF
vs.
BOISE CASCADE CORP.; CHAMPION INTERNATIONAL CORP.; GREAT NORTHERN NEKOOSA CORP.; HAMMERMILL PAPER CO.; INTERNATIONAL PAPER CO.; MEAD CORP.; THE POTLATCH CORP.; SCOTT PAPER CO.; ST. REGIS PAPER CO.; UNION CAMP CORP.; WAUSAU PAPER MILLS CO.; WESTVACO CORP.; WEYERHAEUSER CO.; CROWN ZELLERBACH CORP.; and KIMBERLY CLARK,

State of Montana,
Appellant in No. 81-2349
(D.C. Civil No. 78-3576)

IN RE: FINE PAPER ANTITRUST LITIGATION
(D.C. MDL No. 323)

STATE OF ARKANSAS

vs.

BOISE CASCADE CORPORATION, CHAMPION INTERNATIONAL CORPORATION, CROWN ZELLERBACH CORPORATION, GREAT NORTHERN NEKOOSA CORPORATION, HAMMERMILL PAPER COMPANY, INTERNATIONAL PAPER COMPANY, KIMBERLY CLARK CORPORATION, THE MEAD CORPORATION, POTLATCH CORPORATION, SCOTT PAPER COMPANY, ST. REGIS PAPER COMPANY, UNION CAMP CORPORATION WAUSAU PAPER MILLS COMPANY, WESTVACO CORPORATION, WESTERN PAPER COMPANY, GRAHAM PAPER COMPANY,

State of Arkansas,
Appellant in No. 81-2350
(D.C. Civil No. 78-1716)

Appeal from
the United States District Court
for the
Eastern District of Pennsylvania

Present:
ALDISERT, GIBBONS and HIGGINBOTHAM,
Circuit Judges.

JUDGMENT

These causes came on to be heard on the record from the United States District Court for the Eastern District

of Pennsylvania and were argued by counsel on June 15, 1982.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgments of the said District Court entered February 2, 1981, be, and the same are hereby affirmed. Costs taxed against appellants.

ATTEST:
/s/ Sally Mrvos
Clerk

July 16, 1982

Certified as a true copy
and issued in lieu of a
formal mandate on August 20, 1982.

Test: /s/ M. Elizabeth Ferguson

Chief Deputy Clerk,
U.S. Court of Appeals
for the Third Circuit.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

On Appeal From
The United States District Court
For The Eastern District Of Pennsylvania
In Re: Fine Paper Antitrust Litigation
MDL Docket No. 323

STATE OF ALASKA	No. 81-2341
	(D.C. Civ. No. 78-2958)
STATE OF COLORADO	No. 81-2342
	(D.C. Civ. No. 78-1359)
STATE OF WASHINGTON	No. 81-2343
	(D.C. Civ. No. 78-3081)
STATE OF MISSOURI	No. 81-2344
	(D.C. Cir. No. 78-1095)
STATE OF OREGON	No. 81-2345
	(D.C. Cir. No. 78-1050)
STATE OF CALIFORNIA	No. 81-2346
	(D.C. Cir. No. 78-2494)
STATE OF NEBRASKA	No. 81-2347
	(D.C. Cir. No. 78-1049)
STATE OF IOWA	No. 81-2348
	(D.C. Cir. No. 78-1096)
STATE OF MONTANA	No. 81-2349
	(D.C. Cir. No. 78-3576)
STATE OF ARKANSAS	No. 81-2350
	(D.C. Cir. No. 78-1716)

Plaintiffs-Appellants,

v.

BOISE CASCADE CORPORATION, et al.,

Defendants-Appellees.

PETITION FOR REHEARING IN BANC

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PETITION FOR REHEARING IN BANC

Pursuant to Rule 40(a), F.R.A.P., Plaintiffs-Appellants (hereinafter the "States") hereby petition for rehearing of this cause on the grounds that the Panel's decision of July 16, 1982,[1] affirming the rulings of the district court,[2] demonstrably overlooks and misapprehends material points of both law and fact. Moreover, because the Panel's opinion conflicts with other decisions of this Court[3] and the Supreme Court of the United States,[4] the States suggest,

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1 The opinion was written by Judge Aldisert on behalf of himself and Judges Gibbons and Higginbotham.

2 The Honorable Joseph L. McGlynn of the Eastern District of Pennsylvania.

3 Schutte v. Armco Steel Corp. 431 F2d 22 (3rd Cir. 1970), cert. denied, 401 US 910 (1970).

4 Hoffman v. Blaski, 363 US 335 (1960).

pursuant to Rule 35(b), F.R.A.P., that a rehearing in banc is appropriate, inasmuch as consideration by the full Court is necessary to secure and maintain uniformity of decisions in this Circuit.

I.

VENUE
(Opinion, pp. 20-23)

The decision directly conflicts with the Supreme Court's decision in Hoffman v. Blaski, 363 US 335 (1960), and with this Court's previous decision in Schutte v. Armco Steel Corp., 431 F2d 22 (3d Cir. 1970), which itself relied upon Hoffman. Contrary to those decisions, the Panel held that the prerequisite language of 28 USC § 1404(a) - which restricts the transfer of an action to any district "where it might have been

brought" - relates to the time of transfer, rather than to the time an action is commenced. [5] The decision thus conflicts not only with Hoffman[6] and Schutte,[7] but with a multitude of other cases construing the threshold requirement of § 1404(a) in light of Hoffman,[8] and holding that the limiting language relates to the time an action is originally brought, and to the situation existing at that time.[9]

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5 "We agree with the district court that it was not required to confine its venue consideration to the facts as they existed at the time of the complaint. . . . At the time of the transfer to the Eastern District, the action "might have been brought" in that district. Opinion, p. 21.

6 363 US at 342-344.

7 431 F2d at 24.

8 States' reply brief, pp. 3-5.

9 The only decision cited by the Panel in support of its holding is Hess Oil Virgin Islands Corp. v. UOP, Inc., 447 F.Supp. 381 (N.D. Okla. 1978). That decision, however, merely "assumed" that the

Moreover, the decision labors under the misapprehension that by virtue of settlement agreements, the independent merchant defendants, as to whom venue in the Eastern District was not proper, "were no longer in the case,"[10] and "were no longer parties."[11] In fact, however, the settlements with those defendants were only preliminarily approved at the time of transfer, and those defendants were not dismissed until after the trial ended, long after transfer.[12] In addition, the decision

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threshold requirement of § 1404(a) had been met in order to balance the interests of the parties and rule on the motion for transfer, which it ultimately denied. Thus, Hess stands, at best, as uncertain authority for the Panel's marked departure from the mandate of Hoffman and Schutte.

10 Opinion, p. 20.

11 Id., p. 21.

12 States' reply brief, p. 10; App., p. 7138.

affirmed[13] venue as to Butler Paper[14] on the wholly mistaken belief that Butler was "present" in the Eastern District for purposes of venue. That conclusion, however, overlooks entirely the uncontroverted evidence submitted by Butler[15] on that subject,[16] which clearly demonstrates that Butler at no time had any contacts with the Eastern District sufficient to justify venue.

Finally, the District Court "did not state with particularity the reasons underlying its conclusion"[17] as to Butler, or, indeed, as to its other venue conclusions. Its failure to do so conflicts with the guidelines articulated

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13 Opinion, p. 22.
14 App., p. 3878.
15 App., pp. 1537-1542.
16 App., pp. 1509-1523 and 6491-6493.
17 Opinion, p. 22 note 6.

in Schutte that "the entry of an order which does not enunciate sound prerequisite determinations motivating a district judge to order a transfer in any particular litigation renders this court a disservice."[18] The District Court's order on venue articulates no justification for the § 1404(a) transfer.[19]

II.

DIRECTED VERDICT
(Opinion, pp. 25-27)

The decision seriously misapprehends the nature of the State's conspiracy allegations and the evidence presented in

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18 431 F2d at 24. The decision also overturns this Court's "black letter law" that a plaintiff's choice of forum is of paramount importance in the determination of a transfer request. 431 F2d at 25.

19 App., p. 3448-3449.

support of those allegations. It affirms the directed verdict on the basis of those misapprehensions.

Contrary to the Panel's understanding, the States did not allege simply a "higher level"[20] conspiracy. Rather, the States alleged with specificity a conspiracy operating at both the mill level and the merchant level, involving mills, mill-owned merchants, and certain independent merchants.[21] It was precisely that conspiracy upon which evidence was presented at trial. That evidence

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20 Opinion, p. 27.

21 These allegations were set forth both in the States' complaints (App., pp. 116, 197, 211, 222, 254, 274, 331, 342-343, and 371) and in their pretrial memorandum (App., pp. 2467, 2484, 2491, 2563, 2511, 2540, 2552, 2563, 2571, 2578, 2582, and 2585).

included correspondence between a mill-owned merchant and its parent mill regarding an agreement between five mill-owned merchants[22] and two independent merchants[23] to eliminate price discounting;[24] it included announcements from those same merchants announcing their firm pricing decision;[25]

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22 Butler Paper (Great Northern Nekoosa), J.C. Paper (Wausau), Nationwide (Champion International), Seaboard (Mead), and Zellerbach (Crown Zellerbach).

23 Blake, Moffitt and Towne and Carpenter/Offutt.

24 See States' opening brief, pp. 56-57, and Exhibit 560 (App., p. 4966).

25 See States' opening brief, p. 57, and Exhibits 303 (Butler, App., p.4783), 364 (Carpenter/Offutt; App., p. 4460), 365 (Carpenter/Offutt; App., p. 4861), 366 (Butler; App., p. 4863), 367 (Seaboard; App., p. 4864), 368 (Zellerbach; App., p. 4865), 369 (Nationwide; App., p. 4866), 370 (J.C. Paper; App., p. 4867), 371 (Noland; App., p.4868), 373 (Zellerbach; App., p. 4871), and 379 (B, M & T, App., p.4885).

and it included the virtually identical "mark-up" schedules used by three of those mill-owned merchants and two of those independent merchants to compute retail prices.[26]

The Panels' misapprehension of the conspiracy really in issue is demonstrated by the decision's acknowledgement that such evidence was indeed probative of that conspiracy; i.e. one involving independent merchants. Under the mistaken belief that the

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26 See States' opening brief, pp. 57-60, and Exhibits 358 (App., p. 4852), 359 (App., p. 4856), 374 (App., p. 4872), 375 (App., p. 4875) and 376 (App., p. 4879) (B, M & T); 551 (App., p. 4950) and 552 (App., p. 4959) (Butler); 309 (App., p. 4790) (Carpenter/Offutt); 137 (App., p. 4707) (Seaboard); and 342 (App., p. 4823), 355 (App., p. 4834), 356 (App., p. 4837), 357 (App., p. 4846) and 549 (App., p. 4949) (Zellerbach).

conspiracy alleged involved only a "higher level" conspiracy, the decision states that the evidence "at best was probative of an alleged conspiracy unrelated to the conspiracy whose existence was in issue."[27] But the conspiracy actually in issue involved mills, mill-owned merchants and independent merchants, and operated at both the mill and merchant levels, and the decision itself found the evidence presented "probative" of that conspiracy. Thus, there was no danger, as the decision suggests, of "allowing 'mere speculation . . . to do duty for probative facts'."[28]

In addition, the Panel erred in

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27 Opinion, p. 27.
28 Opinion, p. 27.

concluding that the States did not contest Defendants' argument that the excluded evidence pertained only to retail prices, and that they purchased only at bid prices. The States did contest that, and presented evidence that the conspiracy inflated bid prices as well as retail prices, and that the two price levels were related. [29]

Finally, the decision erroneously describes the evidence kept from the jury as "evidence relating to the independent merchants."[30] In fact, as shown above, the evidence related to mill-owned merchants as well as to independent merchants.[31]

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29 See States' reply brief, pp.17-18 (note 42).

30 Opinion, p. 26.

31 See States' opening brief, pp. 55-61.

III.

RULE 33(c) RESPONSE TO INTERROGATORIES
(Opinion, pp. 29-30)

The decision misapprehends or overlooks the circumstances justifying the States' use of Rule 33(c), F.R. Civ. P, in responding to certain Defendants' interrogatories, and the nature of the interrogatories themselves. Moreover, the decision overlooks the very factors and considerations by which the propriety of Rule 33(c) responses are to be determined, and the legal authorities relevant to that determination, including case law which clearly holds that the propounding party has the burden of showing that Rule 33(c) responses are improper. Defendants made no effort whatsoever to carry that burden,[32] and

there is no evidence in the record even remotely supporting the District Court's ruling that the responses were improper. Quite the contrary is true. [33]

As a result of detailed evidentiary submissions in the form of affidavits from the States,[34] which were at no time refuted by Defendants, the record clearly reflects that the precondition to Rule 33(c) recognized by the decision - that "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as

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32 Either before the District Court or in their brief on appeal.

33 States' opening brief, pp. 61-62

34 States' opening brief, pp. 63-64. The Appendix contains affidavits from Alaska (p. 1312); Arkansas (p. 1318); California (p. 1323); Colorado (p. 1328); Iowa (p. 1335); Missouri (p. 1348); Nebraska (p. 1393); Oregon (p. 1404); and Washington (p. 1473).

for the party served" - has been more than adequately met. Accordingly, the District Court's ruling was clearly erroneous, and constituted an abuse of discretion.[35]

IV.

SCHEDULING OF DISCOVERY AND TRIAL
(Opinion, pp. 18-20)

The decision misapprehends or overlooks the overall chronology of discovery and trial preparation, and the specific grounds upon which the States base their argument.[36] Because the decision does not specifically address

35 The decision's citation to Al Barnett & Son v. Outboard Marine Corp., 611 F.2d 32 (3d Cir. 1979) overlooks the fact that in Barnett, there was ample evidence to support the district court's determination. 611 F.2d at 35. Here there was none.

36 States' opening brief, pp. 5-22.

even the major grounds, it is difficult, in the context of this petition, to specify the misapprehensions and oversights in their entirety.

Certain passages of the decision, however, clearly reflect the Panel's misapprehensions. The most noteworthy is the passage that endorses the District Court's comment that the States' requests for additional time were "just constant."[37] That passage alone reflects numerous misinterpretations of the record. First, the States complied with every deadline established by the District Court, although objecting to the deadlines as unrealistic.[38] They filed their first pretrial memorandum on June

37 Opinion, p. 19.
38 App., pp. 4987-4989.

6, 1980, as required, only one week after the close of a frantic effort to complete discovery by the May 30 deadline, and notwithstanding the virtual futility of the brief, since less than half of the deposition transcripts and exhibits had been received from the court reporter.[39] Second, they appeared for trial one week later, as required, anticipating having to proceed with trial, and were the only parties which took the trial setting seriously and made an effort to proceed, notwithstanding the virtual impossibility of doing so in light of the lack of deposition transcripts and exhibits.[40] Third, the States filed their second pretrial memorandum on July 25,[41] as required, and had requested an extension

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39 States' opening brief, pp. 15-16.
40 App. pp. 4987-4989.
41 States' opening brief, p. 19.

of time solely in order to include all evidentiary citations, which they were unable to include on July 25 because they had still not received all deposition transcripts and exhibits from the District Court's court reporter, notwithstanding the District Court's representation in June that the reporter would have such materials to the States a month in advance of the July 25 deadline.[42] To fault the States for complying with deadlines which were simply patently unreasonable and unrealistic in the first instance reflects a serious misapprehension of the record.

The passage of the decision which

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42 States' opening brief, p. 19; App. pp. 4977-4979.

concludes that the District Court was "firm but fair" by deferring trial from January 2 to June 16 to October 6, thus having "accommodated appellants' requests whenever feasible,"[43] overlooks a number of crucial factors. First, the January 2, 1980 trial date was originally established in a total vacuum, at a time when none of the parties were able to provide specific and realistic predictions of the amount of discovery and trial preparation time needed.[44] Indeed, the plaintiffs' coordinated deposition program had not even commenced as of January 21[45] Second, a trial on June 16 would have been impossible in light of the unavailability of the deposition transcripts and exhibits.

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43 Opinion, p. 19.
44 States' opening brief, pp. 5-6.
45 Id, p. 8.

Third, the October 6 date was established on barely a week's notice, after the States' cases had been "back-burnered" by the District Court's decision not to try the cases with the certified plaintiffs in September, and to establish a date for the States' trial "at a later time."[46]

Moreover, the decision conflicts with previous decisions of this Circuit by adopting the strictest standard imaginable for the review of a district

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46 States' opening brief, p. 20. In this regard, the decisions' reliance upon counsel's statement on June 16 that the States would need until September to accomplish myriad pre-trial matters overlooks the fact that at that time it was anticipated that their cases would be tried with the certified plaintiffs in September, and would not be "back-burnered," thus effectively precluding their access to defendants and the court in order to attend to such matters.

court's scheduling of discovery and trial preparation. By requiring "the clearest showing" of "actual and substantial prejudice,"[47] the decision overlooks the lesser standards of Gaspar v. Kassm, 493 F2d 964 (3d Cir. 1974) and Sutherland Paper Co. v. Grant Paper Box Co., 183 F2d 926 (3d Cir. 1950).[48]

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47 Opinion, p. 18.

48 The decision's mere recital that the States reviewed 2 million documents and deposed 270 persons within a fifteen month period ignores the underlying issue, to wit, how effectively and meaningfully were the States able to accomplish those tasks within the time available. Circumstantial evidence of complex antitrust conspiracies is not that easily gathered, and is not that easily reviewed and assimilated for effective and meaningful presentation at trial.

V.

CLASS CERTIFICATION
(Opinion, page 28)

The decision misapprehends the nature of the States' conspiracy allegations and the "commonality" requirement of Rule 23, F.R. Civ. P., and affirms the District Court's denial of class certification on the basis of those misapprehensions, thus perpetuating the District Court's error. The decision refers to a "horizontal conspiracy among the mill defendants" as the "common issue," and identifies as individual issues the "separate proof" required to establish "vertical conspiracies" involving the independent merchants. The misapprehension is twofold.

First, each State alleged a single conspiracy, involving both mills, mill-owned merchants, and a limited number of specified independent merchants.[49] Second, having misapprehended the conspiracy allegations involved, the decision then justifies the denial of classes by misapprehending and misapplying the "commonality" requirement of Rule 23.

The decision erroneously concludes that proof of vertical conspiracies would

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49 Defendants' brief itself is replete with references to the single conspiracy at issue. See pages 27 ("independent merchants . . . participated in a conspiracy with the mill defendants"; "the alleged conspiracy"), 28 ("a national conspiracy including both mills and merchants"; "the alleged conspiracy"), and 29 ("the States' combined horizontal and vertical conspiracy").

vary between class members, depending upon the identity of the merchants from whom they purchased. That conclusion, however, overlooks the fact that the evidence of conspiracy presented by each of the respective States on behalf of its separate class would pertain to the defendants and co-conspirators named and specified in its own case, and would be the same as that presented by the class members themselves, as required by Rule 23. Yet the "commonality" requirement simply requires that common questions of fact (e.g., conspiracy) be established by proof that is common to both the class representative and the class members. It does not require, as this Court's decision and the District Court held, that proof be common as between separate classes represented by different

plaintiffs. "Commonality" is a requirement of Rule 23, requiring a comparison of the proof which would be relied upon by a class representative with the proof relied upon by members of its class if they initiated their own action; it is not a precept of multidistrict litigation, pursuant to which the proof relied upon by a class in one action is compared to that relied upon by another class in another action. To do so is to compare apples with oranges.

Absent the misapprehension that each State's case involves a "horizontal conspiracy" and several "vertical conspiracies," and the misapprehension that the "commonality" requirement of Rule 23 requires a comparison of proof

between separate classes rather than between a class representative and members of its class, it is apparent that the single conspiracy alleged by each State could be established by common proof. There would be no likelihood, as the opinion suggests, of "factual variations among the alleged vertical conspiracies."[50]

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50 The opinion also misapprehends the number of co-conspirators involved in the States' cases. Rather than the "unspecified number" referred to in the decision, the States' trial memorandum specifically identified a total of 31 co-conspirators as to whom evidence would be presented in the consolidated trial of their ten cases, in addition to the named defendants. See App. pp. 2253-2257.

VI.

COLLEGES AND UNIVERSITIES
(Opinion, pp. 30-31)

The decision misapprehends the basis of the District Court's ruling that the States' lacked standing to sue on behalf of their colleges and universities. The decision's reference to a lack of "evidence" from which the District Court could conclude that the States had such standing overlooks the fact that the District Court ruled purely as a matter of law, relying upon the rationale of the district court decision in Fertilizer,[51] a decision since reversed by the Ninth Circuit Court of Appeals.[52]

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51 In re Fertilizer Antitrust Litigation, 1979-2 CCH Trade Cases ¶ 62, 894 (E.D. Wa. 1979); App. p. 4515.

52 State of Alaska v. Chevron Chemical Company, 669 F.2d 1299 (9th Cir. 1982). The Ninth Circuit's

The respective States' standing to sue on behalf of their various colleges and universities stems from the legal relationship between the States and those institutions, and that relationship is created and defined exclusively by state statutes and case law construing those statutes. Those authorities, as well as the Ninth Circuit's decision in Fertilizer, were entirely overlooked by the Panel. The issue was not, as the decision holds, a matter within the District Court's discretion. It was a matter of law,[53] and the Panel's

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decision was cited to the Panel in the States' reply brief at pp. 20-23, and a copy of the decision was appended thereto.

53 Defendants relied upon the district court Fertilizer decision in seeking to have purchases by colleges and universities excluded (App., p. 4501), and themselves characterized the issue as "a question of law" and "a purely legal

decision overlooks all authority relevant to a determination of that issue.

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one" (App., pp. 4502 and 4514).

Statement of Counsel

I hereby express my belief, based on my reasoned and studied professional judgment, that the panel decision is contrary to decisions of the United States Court of Appeals for the Third Circuit and the Supreme Court of the United States, and that consideration by the full court is necessary to secure and maintain uniformity of decisions in this Court. Specifically, the panel's decision is contrary to the following cases:

Hoffman v. Blaski, 363 US 335 (1960);
Schutte v. Armco Steel Corp.,
431 F2d 22 (3rd Cir. 1970);
Gaspar v. Kassm, 493 F2d 964
(3rd Cir. 1974); and
Sutherland Paper Co. v. Grant Paper Box Co.,183 F2d 926 (3rd Cir. 1950).

/s/ James Kirkham Johns
JAMES KIRKHAM JOHNS

UNITED STATES COURT OF APPEALS
For The Third Circuit

Nos. 81-2341/42/43/44/45/46/47/48/49/50

In Re: Fine Paper Antitrust Litigation

(D.C. MDL No. 323)

SUR PETITION FOR REHEARING

Present: SEITZ, Chief Judge,
and ALDISERT, ADAMS, GIBBONS, HUNTER,
WEIS, GARTH, HIGGINBOTHAM, SLOVITER
and BECKER, Circuit Judges.

The petition for rehearing filed by
Appellants

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,

/s/ Aldisert
Judge

Dated: Aug 12 1982